NO. COA11-1070

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2012

McK ENTERPRISES, LLC,
Plaintiff,

v. McDowell County
No. 09 CVS 464

MICHAEL A. LEVI and wife, SUSAN B. LEVI,
Defendants.

Appeal by Defendants from order entered 21 September 2010 by Judge Alan Z. Thornburg and judgment entered 10 March 2011 by Judge Laura J. Bridges in McDowell County Superior Court. Heard in the Court of Appeals 26 January 2012.

Dameron Burgin Parker Jackson Wilde & Walker, P.A., by Phillip T. Jackson, and W. Hill Evans, PA, by W. Hill Evans, for Plaintiff.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for Defendants.

STEPHENS, Judge.

Procedural History and Factual Background

This appeal arises from a dispute between homeowners and the contractor that built their home. Plaintiff McK

Enterprises, LLC, is a general contractor and construction company based in McDowell County. In February 2007, Defendants Michael A. and Susan B. Levi entered into a contract with Plaintiff to build a home on a lot Defendants owned near Lake James. Defendants attempted to use this contract to secure financing for the home's construction from Asheville Savings Bank ("the bank"). The contract specified a contract price of $439,141.43. However, the bank discovered that Plaintiff's limited license only entitled it to act as a general contractor for any single project with a contract price of up to $350,000.00.

After discovering this discrepancy, the bank required Defendants to sign an acknowledgement that the contract price exceeded the limit of Plaintiff's license. Plaintiff then presented Defendants with a second contract ("the cost-plus contract"), which was identical to the first contract except that the contract price was listed as "[c]ost plus 15%."

Plaintiff began construction on Defendants' home in March 2007. According to evidence produced by Plaintiff at trial, as of 30 September 2007, Defendants had authorized payment of $219,581.82 for Plaintiff's work on the project. On 1 October 2007, an amendment to N.C. Gen. Stat. § 87-10 became effective.

The amendment provided that "the holder of a limited license shall be entitled to act as general contractor for any single project with a value of up to five hundred thousand dollars ($500,000)[.]" N.C. Gen. Stat. § 87-10(a) (2009). Plaintiff was the holder of a limited license affected by the amendment.

In July 2008, three subcontractors advised Defendants that they had not been paid by Plaintiff for work performed on the home and the bank stopped releasing construction loan draws for the project. Defendants spent $86,000.00 out-of-pocket to enable Plaintiff to complete the home. McDowell County issued a certificate of occupancy for the home in November 2008. In April 2009, Plaintiff filed a claim of lien in the amount of $147,038.85, and brought the instant action on 26 May 2009.

At the close of Plaintiff's evidence and again at the close of all evidence, Defendants moved for a directed verdict, arguing *inter alia*, that the contract was illegal and unenforceable because it exceeded the limits of Plaintiff's license on the date it was signed. The court denied each of the motions in open court. On 16 March 2011, the jury returned a verdict that Defendants breached the cost-plus contract and owed Plaintiff $90,000.00. The jury also found that Plaintiff did not breach the cost-plus contract. On the same date, Defendants

moved for judgment notwithstanding the verdict ("JNOV"), and the trial court denied the motion in open court. The court entered judgment for Plaintiff by order filed 18 March 2011. However, the record on appeal does not contain a written order denying the motion for JNOV, and we cannot determine whether the court ever reduced its oral ruling to writing.

Discussion

Defendants bring forward two arguments on appeal: (1) that the trial court erred in denying their motion for JNOV, and (2) that this Court should not enforce the construction contract because it was illegal. For the reasons discussed herein, we dismiss in part and vacate and remand in part.

Denial of Motion for JNOV

On appeal, Defendants argue that the trial court erred in denying their motion for JNOV. Because Defendants have failed to preserve this argument for our review, we must dismiss it.

As Plaintiff notes, Defendants gave notice of appeal from the final judgment entered 18 March 2011, but not specifically from the denial of their motion for JNOV.[1] Defendants also

[1]Defendants also gave notice of appeal from the 21 September 2010 order denying their motion for summary judgment. However, Defendants do not bring forward any arguments related to that order in their brief, and as such, they have waived their appeal of the summary judgment order.

failed to include a copy of the order denying their JNOV motion (if such order exists) in the record on appeal. These failures deprive this Court of jurisdiction to hear Defendants' appeal of the court's denial of their JNOV motion.

This Court has held that

> failure to submit a copy of the purported order from which [a party] appeals is a violation of Appellate Rule 9(a)(1)(viii), which states in clear language that the record on appeal in civil actions shall contain "a copy of the judgment, order or other determination from which appeal is taken." . . . [S]ubmission of the transcript of the trial court's statements as to what [it] will find and order is not sufficient.

Sessoms v. Sessoms, 76 N.C. App. 338, 339, 332 S.E.2d 511, 512-13 (1985) (dismissing an appeal from a proceeding in which "[t]he trial court ruled on several issues in open court; however, its rulings were apparently never reduced to a written order"). Further, "N.C.R. App. P. 3(d) provides that an appellant's notice of appeal shall designate the judgment or order from which appeal is taken. An appellant's failure to designate a particular judgment or order in the notice of appeal generally divests this Court of jurisdiction to consider that order." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 347, 666 S.E.2d 127, 133 (2008) (internal quotation marks, brackets,

and citations omitted), *disc. review denied*, 363 N.C. 260, 677 S.E.2d 461 (2009). "A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (citation omitted). "[I]n the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of Rule 2 [to hear the appeal despite appellate rules violations]." *Id.* at 198, 657 S.E.2d at 365.

In some circumstances, however, we can reach the merits of an appeal even where an appellant has failed to comply with Rule 3(d):

> Notwithstanding the jurisdictional requirements in Rule 3(d), our Court has recognized that even if an appellant omits a certain order from the notice of appeal, our Court may still obtain jurisdiction to review the order pursuant to N.C. Gen. Stat. § 1-278. Review under N.C.G.S. § 1-278 is permissible if three conditions are met: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.

Yorke, 192 N.C. App. at 348, 666 S.E.2d at 133 (internal quotation marks and citations omitted).

Here, Defendants did not object to the denial of their motion. In response to the court's denial of the JNOV motion in open court, defense counsel[2] merely replied, "Thank you, Your Honor." Thus, Defendants cannot satisfy the first requirement under section 1-278 as described in *Yorke*. As noted *supra*, we cannot determine whether the trial court ever reduced its oral ruling to writing, and we acknowledge the difficult position of an appellant in such situation. However, if the trial court failed to enter a written order, Defendants could have moved the court for entry of a written order on the JNOV motion, excepted to the ruling in open court (to attempt to preserve their right of appeal via section 1-278), or included the trial court's oral ruling in their notice of appeal. Here, they did none of these things. Accordingly, we dismiss this argument.

Illegality

Defendants next argue that this Court should not enforce the cost-plus contract because it was entered into illegally. Specifically, Defendants contend that Plaintiff is barred from recovery in excess of the $350,000.00 limit of its license on the date the contract was signed. We disagree.

We find *Dellinger v. Michal* instructive on this question.

[2]Defendants' appellate counsel did not represent them at trial.

92 N.C. App. 744, 375 S.E.2d 698, *disc. review denied*, 324 N.C. 432, 379 S.E.2d 240 (1989). In *Dellinger*, the parties entered into a cost-plus construction contract "with a ceiling of $186,880.00[,]"[3] even though both parties were aware that the builder held a limited general contractor's license with a limitation of $175,000.00. *Id.* at 745, 375 S.E.2d at 698. Slightly over a month into the project, the builder obtained an unlimited license. *Id.* In holding that the contractor was *not* barred from a recovery which exceeded the limit of the builder's license *at the time the contract was signed*, this Court reviewed the relevant case law:

> In *Brady v. Fulghum*, 309 N.C. 580, 308 S.E.2d 327 (1983), our Supreme Court adopted the rule that "a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor. It cannot be validated by the contractor's subsequent procurement of a license." *Id.* at 586, 308 S.E.2d at 331. Thus, a contract entered into by an unlicensed contractor is illegal and unenforceable. In *Sample v. Morgan*, 311 N.C. 717, 319 S.E.2d 607 (1984), a contractor with a $125,000.00 limited license entered into a construction contract for $115,967.81. The contractor and the homeowner agreed to changes and additions to the contract and the final construction cost was over $130,000.00. The Supreme Court specifically rejected previous cases that

[3]The eventual total cost of the project was alleged to exceed $230,000.00. *Id.*

> had denied recovery of any amount for contractors who exceed the amount of their license and allowed the contractor to recover an amount not to exceed the limit of his license. The Court stated that "until [the contractor] exceeded the allowable limit of his license, he was not acting in violation of G.S. [Section] 87-10." *Id.* at 723, 319 S.E.2d at 611.

Id. at 746, 375 S.E.2d at 699. In applying this reasoning to the facts in *Dellinger*, this Court noted that the builder had presented an "affidavit that he had passed the unlimited general contractor examination when the contract . . . was executed and that he had done approximately $2,800.00 worth of work before he was issued his unlimited license." *Id.* Because "the value of the work done by [the builder] was never in excess of his license limit, plaintiff was not, as evidenced by his license, incompetent to perform the work." *Id.* at 747, 375 S.E.2d at 699. As a result, this Court reversed the trial court's grant of summary judgment in favor of the homeowners, holding that the builder "should be allowed to prove his case if he can and is entitled if successful to recover to the extent of his unlimited license." *Id.*

The facts here are on point in all pertinent respects. Plaintiff and Defendants entered into a cost-plus contract which each party knew would likely exceed the $350,000.00 limit of

Plaintiff's license. At trial, Plaintiff produced uncontradicted evidence that, as of 30 September 2007, Defendants had authorized payments totaling $219,581.82, an amount within Plaintiff's licensure limits. As of that date, "the value of the work done by [Plaintiff] was [not] in excess of his license limit[.]" *Id.* at 747, 375 S.E.2d at 699. On 1 October 2007, the amendment to section 87-10 raised the limits of Plaintiff's license to $500,000.00, and that remained the limit of Plaintiff's license through the completion of the project. Thus, Plaintiff was entitled "to prove [its] case . . . and . . . recover to the extent of [its] license." *Id.* That limit was $500,000.00.

After finding Plaintiff had proved its case, the jury awarded it $90,000.00.[4] Because Defendants had previously paid Plaintiff $415,269.11, this award would bring Plaintiff's recovery to $505,269.12, an amount exceeding the limits of Plaintiff's license. It was error for the trial court to enter judgment in this amount. Accordingly, we vacate the judgment and remand to the trial court for reduction of the jury's award

[4]As noted by the parties and the trial court, although the jury returned a verdict finding that Plaintiff had not breached the contract, the jury nonetheless awarded Defendants $1.00 in damages. The trial court entered judgment against Defendants in the amount of $89,999.00.

to $84,730.89, which will limit Plaintiff's total recovery to $500,000.00, the limit of its license.

DISMISSED IN PART; VACATED AND REMANDED IN PART.

Judges STROUD and BEASLEY concur.

Report per Rule 30(e).